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MUSTAQEEM ZOLKEFLEE v. AYOB MUSTAPA & ANOTHER CASE

HIGH COURT MALAYA, MUAR
SURIA KUMAR DJ PAUL JC
[CIVIL SUIT NOS: JB-22NCVC-27-04-2021 & JB-22NCvC-28-04-2021]
B 20 NOVEMBER 2023

Abstract – *A memorandum of transfer (Form 14A) executed by a transferor and transferee using an impugned irrevocable power of attorney which has no valuable consideration, thereby falling foul of s. 6 of the Power of Attorney Act 1949, is considered null and void. A power of attorney is only a subsidiary instrument. Thus, such transfer of land is defeasible under s. 340(2)(b) of the National Land Code on the ground that it is registered using void instruments.*

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LAND LAW: *Transfer – Validity – Power of attorney – Transfer of land via irrevocable power of attorney purportedly executed by registered proprietors of land in favour of purchaser – Whether there was fraud – Whether there was valuable consideration given by purchaser to registered proprietors of land – Whether power of attorney conferred proprietary right to purchaser – Whether power of attorney only a subsidiary instrument and not sale and purchase agreement – Whether power of attorney fell foul of s. 6 of Power of Attorney Act 1949 – Whether null and void – Whether transfer of land defeasible – National Land Code, s. 340(2)(b)*

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The plaintiff ('Mustaqeem'), in Suit 27, became the registered proprietor of a piece of land on 4 March 2018 upon transfer from his father's company Nadi Ulung Sdn Bhd ('Nadi Ulung'). Around the same time, another piece of land was transferred from Nadi Ulung to his older brother, the plaintiff in Suit 28 ('Naqiuddin'). Not long thereafter, the plaintiffs' father ('PW3') asked for a broker ('PW2') to look for a buyer for both the lands. The broker introduced the plaintiffs' father to a prospective buyer ('Dato' Salleh') who agreed to purchase both the lands for RM3.8 million. Both parties also agreed to meet in the broker's house sometime in early December 2018 to discuss the sale transaction. At the meeting, Naqiuddin, PW3, Dato' Salleh and his family, one Salehuddin, and a few others, were present. In the course of the meeting, a solicitor ('DW3') hurriedly dropped by the broker's house and attended to the execution of a document by Naqiuddin and left. Further during the meeting, Dato' Salleh handed a cheque for the sum of RM370,000 in favour of PW3 and transferred a further sum of RM10,000 online into PW3's account. However, Dato' Salleh informed PW3 not to cash the cheque with the understanding that he would give a replacement cheque to PW3. During the evening of the same day, PW3, Dato' Salleh and

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Salehuddin met again at McDonald's Petronas. During this meeting, the same solicitor, DW3, attended to the execution of a document by Mustaqeem. PW3 had deposited the original title deeds for both lands to be kept by DW3 on the same day. Thereafter, neither the plaintiffs nor their father received any payment of the purchase price apart from the RM10,000 transferred online by Dato' Salleh. It was not in dispute that the cheque for the sum of RM370,000 was never cashed and cleared in PW3's account. Sometime on 31 March 2019, the plaintiffs got to know that the land was caveated by one Ayob Mustapa ('defendant') upon conducting a land search as a result of interest shown by a developer in doing a joint venture in respect of the plaintiffs' lands. This led to the plaintiffs applying to remove the private caveats by way of a court order and subsequently lodging private caveats to protect their interest. The court orders for the removal of the defendant's private caveat were obtained and in the course of registering these orders, it came to light that Mustaqeem's land had already been transferred onto the defendant's name using an irrevocable power of attorney, whereas Naqiuddin's land was yet to be transferred. This was when the plaintiffs knew for the first time the existence of an irrevocable power of attorney purportedly executed by them in favour of the defendant. The defendant's version was that he had gotten to know from one Faeez Amirul ('DW2'), Dato' Salleh and Salehuddin that the lands were for sale by the owners. According to the defendant, PW3 had requested for cash payment and the sale and purchase transaction to be *via* a power of attorney to avoid real property gains tax. Based on a purported deposit payment of RM100,000, the defendant lodged private caveats on both lands. The defendant claimed that he had been duly informed by DW2 and DW3 that the plaintiffs had executed the power of attorney. The plaintiffs commenced this action against the defendant to declare the irrevocable power of attorney as null and void. In Suit 27, Mustaqeem also prayed for the cancellation of the registration of the transfer of his land into the defendant's name. The issues that arose were: (i) whether the plaintiffs failed to plead fraud; (ii) whether the plaintiffs executed the irrevocable power of attorney in favour of the defendant for the sale of the lands; (iii) if it was duly executed, was the irrevocable power of attorney valid; (iv) whether there was any sale and purchase agreement executed by the plaintiffs and defendant for the sale of the lands; and (v) whether there was any consideration paid for the purchase of the lands to the plaintiffs or their father.

Held (allowing plaintiffs' claims):

(1) The plaintiffs submitted that their claim was premised on challenging the validity of the irrevocable power of attorney executed by them in favour of the defendant and the memorandum of transfer executed by the defendant using the said power of attorney to transfer the lands to the

defendants and to declare the same as null and void. The plaintiffs' pleaded claim was to set aside the transfer of the lands that was done by using void instruments. In the circumstances, there was no merit in the defendant's argument that the plaintiffs had failed to plead fraud and details of fraud. (paras 34-36)

(2) The plaintiffs conceded that they were not disputing that the signatures appearing in the impugned power of attorney was forged or falsified. What the plaintiffs contended was that the purported document executed by them was a sale and purchase agreement and at no point in time did they agree to execute an irrevocable power of attorney. They were under the impression all the while that they were executing a sale and purchase agreement with Dato' Salleh being the purchaser of their lands. Furthermore, their father also received a cheque in the sum of RM370,000 together with an online payment for RM10,000 from Dato' Salleh on the date when the plaintiffs executed the impugned power of attorney. In such circumstances, if at all the impugned power of attorney in favour of the defendant was indeed explained to the plaintiffs, surely the plaintiffs and their father would have questioned DW3 as to why the defendant was involved in the sale transaction instead of Dato' Salleh. The defendant was a stranger to the plaintiffs and their father and they had never met before. As such, the only irresistible inference which could be drawn was that DW3 did not explain the contents of the impugned power of attorney to the plaintiffs but merely attended to their execution of the same by the plaintiffs. Further, the impugned power of attorney made no mention of any valuable consideration. In the circumstances, the impugned power of attorney, had fallen foul of s. 6 of the Power of Attorney Act 1949. (paras 48-80)

(3) Since the plaintiffs denied receiving any purchase consideration for the sale of the land apart from the RM10,000 online payment, the burden was on the defendant to call Dato' Salleh and Sallehuddin since the defendant was alleging that the payment of RM100,000 and RM650,000 was made through Dato' Salleh in the presence of Sallehuddin. In the circumstances, an adverse inference under s. 114(g) of the Evidence Act 1950 ought to be drawn against the defendant for failing to call Dato' Salleh and Sallehuddin to testify with regards to the payment of RM100,000 and RM650,000 to the plaintiffs and/or their father. The inference which needed to be drawn was that if they were called, both of them would not be able to confirm or produce any evidence of the purported payments to the plaintiffs and/or their father. Also, the defendant himself did not lodge any report stating that these payments were made to the plaintiffs. There was thus no iota of evidence that these

sums were indeed paid by the defendant except for the sum of RM10,000 transferred by Dato' Salleh to the plaintiff's father on the date of the execution of the power of attorney. The defendant had failed to prove, on the balance of probabilities, that he had paid the sum of RM750,000 to the plaintiff and/or their father towards the purchase of the lands. (paras 98-105)

(4) DW3, as an advocate and solicitor, had a duty to ensure that the purchase considerations for the lands were fully paid by the defendant to the plaintiffs and obtain a written confirmation from the plaintiff that they had received the monies before proceeding to adjudicate the memorandum of transfer and presenting it to the land office. He ought not to have relied only on the defendant or whoever instructed him on behalf of the defendant in respect of payment of the purchase considerations to the plaintiffs. The solicitor had failed to discharge his duties carefully and diligently. His conduct as an advocate and solicitor in attending to the conveyance of the lands between the plaintiffs and the defendant certainly fell short of good conveyancing practice. What the defendant did was use the power of attorney executed by the plaintiffs to transfer the said lands onto himself by signing as transferor and transferee. The power of attorney made no mention of any valuable consideration given by the defendant to the plaintiffs if indeed the purpose of the power of attorney was to serve as a sale and purchase agreement between the parties. The impugned power of attorney had no life of its own. It did not confer any proprietary right to the defendant. (paras 109-113)

(5) The impugned power of attorney was only a subsidiary instrument and not a sale and purchase agreement for the lands that contained all the terms and conditions for the sale. The defendant had no right to use the impugned power of attorney which had no valuable consideration and which was not a sale and purchase agreement to transfer the lands. The impugned irrevocable power of attorney in both cases were null and void. Hence, the memorandum of transfers (Form 14A) executed by the defendant as transferor and transferee using the impugned irrevocable power of attorney in both cases were null and void. The transfer of Mustaqeem's land to the defendant, therefore, was defeasible under s. 340(2)(b) of the National Land Code on the ground that it was registered using the power of attorney and memorandum of transfer which were void instruments. The plaintiffs proved their claim on the balance of probabilities. (paras 114-122)

A **Case(s) referred to:**
Affluent Freight Sdn Bhd v. Sumathi K Appukuttan Pillai & Anor [2001] 8 CLJ 71 HC ***(refd)***
Five Star Heritage Sdn Bhd & Ors v. Nai Ninn Sararaksh & Anor [2023] 5 CLJ 345 CA ***(refd)***
Hiroto Watanabe v. Law Yen Yen & Anor [2012] 3 CLJ 302 HC ***(refd)***
Hj Fauzi Hj A Majid v. Kenangan Erat Sdn Bhd [2005] 8 CLJ 230 HC ***(refd)***
B *Hong Yik Trading v. Liziz Plantation Sdn Bhd [2017] 8 CLJ 491 FC* ***(refd)***
Ngadi Apandi v. Mohamad Ali Md Ahsan & Ors [2016] CLJU 1743; [2016] 1 LNS 1743 HC ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Tan Ah Kow & Anor v. Tan Chaui En [2018] 2 CLJ 610 CA ***(refd)***

C **Legislation referred to:**
Evidence Act 1950, s. 114(g)
National Land Code, ss. 340(2)(b), 417
Power of Attorney Act 1949, s. 6

For the plaintiff - Mohd Hamizi Mohd Yusof; M/s Raziyan Rahim & Assocs
D *For the defendants - Amir Anuar Abdul Ghani, Dzaki Ezhar Bahar, Mohamad Hilmi Mahmud & Anis Nur Atikah Abd Rahman; M/s Amir Anuar & Co*

Reported by Suhainah Wahiduddin

JUDGMENT

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Suria Kumar DJ Paul JC:

Introduction

[1] Both the above cases concern the sale of two individual pieces of land.

F **[2]** The plaintiffs claim they do not know the defendant and contend that they never agreed to sell the land to the defendant by way of an irrevocable power of attorney.

[3] On the other hand, the defendant says he never met the plaintiffs but is aware from third parties that plaintiffs agreed to sell the land *via* an G irrevocable power of attorney to avoid Real Property Gains Tax.

[4] Since the purported sale of both lands happened almost the same time involving common parties, common facts and the trial was heard together, I propose to deliver one judgment only.

H **Background Facts**

[5] The plaintiff, Mustaqeem bin Zolkeflee ("Mustaqeem") in Suit No. 27 became the registered proprietor of land known as H.S.(M) 1648 PTD 8103, Mukim Kesang, Daerah Tangkak, Negeri Johor on 4 March 2018 upon transfer from his father's company Nadi Ulung Sdn Bhd.

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[6] Around the same time, another piece of land known as as H.S.(M) 1649 PTD 8103, Mukim Kesang, Daerah Tangkak, Negeri Johor was transferred from Nadi Ulung Sdn Bhd to his older brother Naqiuddin Bin Zoikeflee ("Naqiuddin"), the plaintiff in Suit No. 28.

[7] Both Mustaqeem and Naqiuddin are brothers and will be referred to as the plaintiffs hereafter.

[8] Not long thereafter the plaintiffs' father (PW3) asked a broker (PW2) to look for a buyer for both the lands.

[9] The broker introduced the plaintiffs' father to a prospective buyer called Dato' Salleh bin Mohamed ("Dato' Salleh") who agreed to purchase both the lands for RM3.8 million.

[10] Both parties also agreed to meet in the broker's house sometime in early December 2018 to discuss the sale transaction. The meeting took place on 11 December 2018 at the broker's house in Muar.

[11] At the meeting, plaintiff Naqiuddin, his father, Dato' Salleh and his family, one Sallehuddin bin Satar ("Sallehuddin Satar") and a few other individuals presumably Dato' Salleh's bodyguard were present.

[12] In the course of the meeting, a solicitor, Mohd Arif bin Kamisan (DW3) hurriedly dropped by the broker's (PW2) house and attended to the execution of a document by plaintiff Naqiuddin and left.

[13] Further during the meeting, Dato' Salleh handed a cheque for the sum of RM370,000 in favour of the plaintiffs' father and transferred a further sum of RM10,000 online into the plaintiffs' father's account.

[14] Upon handing over the cheque for the sum of RM370,000 to the plaintiffs' father, Dato' Salleh informed him not to cash the cheque with the understanding he would give a replacement cheque to the plaintiffs father.

[15] During the evening of the same day, the plaintiffs' father, Dato' Salleh and Sallehuddin Satar met again at Mcdonald's Petronas Skudai, Johor. During this meeting, the same solicitor (DW3) attended to the execution of a document by plaintiff Mustaqeem.

[16] It is not in dispute that the plaintiffs' father had deposited the original title deeds for both lands to be kept by the solicitor (DW3) on the same day.

[17] Thereafter, neither the plaintiffs nor their father received any payment of the purchase price apart from the RM10,000 transferred online by Dato' Salleh.

[18] It is not in dispute that the cheque for the sum RM370,000 was never cashed and cleared in the plaintiffs' father's account.

[19] Sometime on 31 March 2019, the plaintiffs got to know the land was caveated by one Ayob bin Mustapa @ Mustafa, the defendant upon conducting a land search as a result of interest shown by a developer in doing a joint venture in respect of the plaintiffs' lands.

[20] This led to the plaintiffs applying to remove the private caveats by way of a court order and subsequently lodging private caveats to protect their interest.

[21] The court orders for the removal of the defendant's private caveat were obtained and in the course of registering these orders, it came to light that plaintiff Mustaqeem's land had already been transferred onto the defendant's name using an irrevocable power of attorney.

[22] Whereas plaintiff Naqiuddin's land was yet to be transferred.

[23] This was when the plaintiffs knew for the first time the existence of an irrevocable power of attorney purportedly executed by them in favour of the defendant.

[24] The plaintiffs and their father do not know the defendant.

[25] The defendant's version is that he got know from one Mohamad Faeez Amirul bin Mohd Fauzi ("Faeez Amirul"), Dato' Salleh and Sallehuddin Satar that that the lands were for sale by the owners.

[26] According to defendant (DW1), the plaintiffs' father requested for cash payment and the sale and purchase transaction to be *via* a power of attorney to avoid real property gains tax.

[27] Defendant was informed by Faeez Amirul (SD2) in early November 2018 that the plaintiffs' father had asked for a commitment fee of RM100,000. This sum was withdrawn by defendant from his bank account and handed to Faeez Amirul, Dato' Salleh and Sallehuddin Satar to be paid to the plaintiffs' father.

[28] Based on this purported deposit payment of RM100,000, defendant lodged private caveats on both lands.

[29] The defendant was duly informed by Faeez Amirul (DW2) and the solicitor (DW3) that the plaintiffs had executed the Power of Attorney.

[30] Plaintiffs commenced this action against defendant to declare the irrevocable power of attorney as null and void.

[31] In Suit No. 27, plaintiff Mustaqeem, also prays for the cancellation of the registration of the transfer of his land into defendant's name.

[32] Apart from the plaintiffs, the remaining witnesses at the trial were common witnesses giving similar evidence in both cases.

Issues To Be Determined

[33] In my view the following issues need to be determined:

(i) whether plaintiffs failed to plead fraud;

(ii) whether plaintiffs executed an irrevocable power of attorney in favour of defendant for the sale of the lands;

(iii) if it was duly executed, is the irrevocable power of attorney valid;

(iv) whether there was any sale and purchase agreement executed by the plaintiffs and defendant for the sale of the lands; and

(v) whether there was any consideration paid for the purchase of the lands to the plaintiffs or their father.

Analysis And Finding

Whether Plaintiffs Failed To Plead Fraud Or Details Of Fraud

[34] The defendants submit that the plaintiffs have failed to plead fraud and details of fraud.

[35] Whereas the plaintiffs submit that their claim is premised on challenging the validity of the irrevocable power of attorney executed by them in favour of the defendant and the memorandum of transfer executed by the defendant using the said power of attorney to transfer the lands to the defendants and to declare the same as null and void.

[36] I have perused through the plaintiffs' statement of claim. I find the plaintiffs' pleaded claim is to set aside the transfer of the lands that was done by using void instruments.

[37] In this circumstance, I find no merit in the defendant's argument.

Whether Plaintiff And His Brother Executed The Irrevocable Power Of Attorney

[38] Plaintiffs plead in their statement of claim that they never executed the impugned power of attorney.

[39] Apart from the denial in their testimony that the signature appearing in the impugned power of attorney is not theirs, no other evidence was proffered by plaintiff to show that their signatures were forged.

[40] Whereas defendant called the solicitor (DW3) who prepared the impugned power of attorney and attested to the plaintiffs and signature to prove the power of attorney was duly executed by the plaintiffs.

[41] To corroborate this fact, defendant produced a video recording of plaintiff Mustaqeem signing a document in the presence of the solicitor (DW3) at McDonald's Petronas Skudai on 11 December 2018.

[42] The admissibility of the video recording is challenged by the plaintiff because the recording and sound are not clear. It was then marked as ID 11 and the transcription of the conversation from the recording was marked as ID 12.

[43] Whereas for plaintiff Naqiuddin, the defendant produced photographs of him signing a document in the presence of the solicitor (DW3) at the broker's (PW2) house during the meeting on 11 December 2018. These photographs were marked D13 (1 & 2).

[44] The court finds that even without the evidence of the video recording and the photographs, the defendant has succeeded in proving that the signature appearing on the impugned power of attorney belongs to plaintiffs based on my reasons given below.

[45] I find that plaintiff Mustaqeem during his cross-examination agreed that he had signed the impugned power of attorney when it was referred to him. His evidence is reproduced below:

PD-1: Encik Mustaqeem pernah tandatangan surat kuasa wakil. Rujuk muka surat 4, 5, 6, 7 Bundle C. Pohon refer mukasurat 7 Bundle C dan Penyata Saksi PWS-1 muka surat 9?

SP-1: Pernah sign.

[Please see page 3 notes of evidence]

[46] Whereas plaintiff Naqiuddin also agreed he had executed the impugned power of attorney when the photographs D13 (1 & 2) were referred to him. His evidence is reproduced below:

PD-1: Encik Mustaqeem

PD-1: Pada mukasurat gambar A dan B tengah menandatangani dokumen?

SP-1: Setuju.

PD-1: Encik menandatangani SKW di hadapan yang nama Arif Bin Kamisan?

SP-1: Setup.

(Please see page 9 notes of evidence)

[47] The testimony of the attesting solicitor (DW3) that he had witnessed the execution of the irrevocable power of attorney by the plaintiffs which is crucial remains unchallenged. DW3 was never challenged by the plaintiff during cross-examination that the signature appearing on the impugned power of attorney does not belong to the plaintiffs, it was not put to DW3 that he never attested to the plaintiffs' signature.

[48] In addition, during oral submissions in court, learned counsel for the plaintiffs candidly conceded that the plaintiffs are not disputing that the signature appearing in the impugned power of attorney is forged or falsified.

[49] What the plaintiffs contend is that, the purported document executed by them is a sale and purchase agreement and at no point in time did they agree to execute an irrevocable power of attorney.

[50] In other words, the plaintiffs are only attacking the identity of the document signed by them but they do not deny having signed a document witnessed by the solicitor DW3.

[51] In the circumstances, I find the power of attorney was indeed executed by the plaintiffs.

[52] For completeness, I will address the admissibility of the video recording and the transcription of the recording.

[53] Learned counsel for the plaintiffs objected to the video recording on the ground the sound was poor and inaudible. Having heard the recording, I find the purported explanations given to plaintiff Mustaqeem before the execution of the impugned power of attorney inaudible. In *Hiroto Watanabe v. Law Yen Yen & Anor* [2012] 3 CLJ 302, it was held by His Lordship Harmindar Singh Dhaliwal (as he then was):

> Having heard the recording and perusing the transcript, I had serious doubts as to whether the transcript accurately reflected the conversation that took place. This is so because the sound recording was poor, inaudible at times, broken and for the most part unintelligible. In my view, the recording was wholly unreliable to prove anything. For this reason, I considered it unsafe to rely on this evidence and it was accordingly rejected

[54] In addition, the defendant failed to call the maker of the recording, one Abdul Rahman bin Abu Bakar ("Abdul Rahman") who recorded it using his handphone.

[55] Neither did defendant adduce any evidence as to who transcribed the conversation from the video recording and called the transcriber.

[56] In this circumstance, I rule that the video recording marked as ID 11 and the transcription of the conversation from the recording marked as ID 12 is inadmissible

Is The Irrevocable Power Of Attorney Valid?

[57] The crux of the plaintiffs' claim is that the impugned power of attorney is null and void.

[58] The plaintiffs' case is that they were under the impression all the while they were executing a sale and purchase agreement with Dato' Salleh being the purchaser of their lands.

[59] Their father too gave evidence that he was under the impression that his sons, the plaintiffs were executing a sale and purchase agreement with Dato' Salleh as the buyer.

[60] Next, plaintiffs testified that the document which they executed was never explained to them by the solicitor (DW3).

[61] However, according to the solicitor (DW3), he had explained the contents of the impugned power of attorney to the plaintiffs before their execution.

[62] The evidence before the court shows that the defendant is a stranger to the plaintiffs and their father and they never met before.

[63] The plaintiffs and their father were all the while under the impression that the buyer was Dato' Salleh. Furthermore, their father also received a cheque in the sum of RM370,000 together with an online payment for RM10,000 from Dato' Salleh on the date when the plaintiffs executed the impugned power of attorney.

[64] In such circumstances, if at all the impugned power of attorney in favour of the defendant was indeed explained to the plaintiffs, surely the plaintiffs and their father would have questioned the solicitor (DW3) as to why is the defendant involved in the sale transaction instead of Dato' Salleh.

[65] The photographs and video recording too do not corroborate the solicitor's (DW3) evidence that the impugned power of attorney was explained to the plaintiffs. In any event, I have already ruled above that the video recording is inadmissible.

[66] As such the only irresistible inference which can be drawn is that DW3 did not explain the contents of the impugned power of attorney to the plaintiffs but merely attended to their execution of the same by the plaintiffs.

[67] Plaintiffs also attacked the impugned power of attorney on the ground that though the execution and attestation took place on 11 December 2018, however, it is dated 15 May 2019 which is approximately six months later and stamped on 16 December 2020, more than two years later.

[68] The defendant (DW1) and his solicitor (DW3) explained as to the delay. The reason is to ensure the transfer of the said land is not carried out within five years from the date the plaintiffs have acquired the said land from their father's company for purposes of exemption from real property gains tax.

[69] The other reason being that the defendant required time to raise finance for the stamp duty and the plaintiff's father intended to sell the lands at a higher price to a third party and reimburse the defendant for the purchase price together with profit.

[70] Hence, the impugned power of attorney was kept in abeyance.

[71] I do not find the defendant's explanation acceptable. In the normal course, the impugned power of attorney ought to have been dated on the same day it was executed by the plaintiff and witnessed by the solicitor (DW3).

[72] However, the fact remains that the impugned power of attorney was executed and attested on 11 December 2018.

[73] Since the plaintiffs are not disputing their signature on the impugned power of attorney, I do not find this ground alone sufficient to invalidate the power of attorney.

[74] The plaintiffs also attacked the validity of the impugned power of attorney on the ground it had contravened s. 6 of the Power of Attorney Act 1949 for lack of valuable consideration.

[75] Section 6 Power of the Attorney Act 1949 ("POA") read:

> 6 Powers of attorney given for valuable consideration
>
> (1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser:
>
> (a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the done of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and
>
> (b) any act done at any time by the done of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the done of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and
>
> (c) neither the done of the power, nor the purchaser, shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the done of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power.
>
> (2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

[76] The solicitor (DW3) agreed in his cross-examination that under s. 6 of the POA Act, a power of attorney requires valuable consideration.

[77] It is not in dispute that the impugned power of attorney makes no mention of any valuable consideration.

[78] In *Affluent Freight Sdn Bhd v. Sumathi K Appukuttan Pillai & Anor* [2001] 8 CLJ 71, His Lordship Zulkefli Makinudin J (as he then was) held:

> [6] The PA had fallen foul of ss. 6 and 7 respectively of the Power of Attorney Act 1949, for expressing itself as irrevocable when no valuable consideration was given and ...

[79] Further in *Hj Fauzi Hj A Majid v. Kenangan Erat Sdn Bhd* [2005] 8 CLJ 230, His Lordship Low Hop Bing (as he then was) held:

> [1] Upon a proper construction of s. 6(1)(a) of the Powers of Attorney Act 1949, valuable consideration is an essential element in order to sustain the irrevocability of a power of attorney and that this valuable consideration must be expressly stated in specific particulars either in the power of attorney itself ...

[80] In the circumstances, I find the impugned power of attorney, has fallen foul of s. 6 of the POA Act and therefore, is invalid.

Any Consideration Paid For The Purchase Of The Land

Whether Any Sale And Purchase Agreement Was Executed

[81] The defendant pleaded in his defence that a sum of RM750,000 was paid towards the purchase of the lands with each at the price of RM375,000.

[82] The legal burden is on the defendant to prove that the sum of RM750,000 was paid to the plaintiffs as provided by s. 101 of the Evidence Act 1950. This was explained in the case of *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491 by His Lordship Ariffin Zakaria CJ as follows:

> It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (s. 101 of the Evidence Act 1950). Where a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. However, if the party on whom the burden of proof lies fails to discharge it, the other party need not call any evidence

[83] According to the defendant, a deposit of RM100,000 was paid from the sum of RM250,000 withdrawn from his OCBC Bank account on 23 November 2018.

[84] The defendant says he handed the sum RM100,000 to Faeez Amirul and thereafter Faeez Amirul together with Dato' Salleh and Sallehuddin Satar handed this sum to the plaintiffs' father at Starbucks cafe at the lobby of KSL Hotel Johor Bahru.

[85] This was followed by a balance purchase price of RM650,000 which was paid from the sum of RM899,000 withdrawn by defendant from his Lembaga Tabung Haji account.

[86] According to defendant (DW1), upon withdrawing the sum of RM899,000, he deposited this sum by way of cash deposit into Faeez Amirul's company called Al Afaq Event Management's account.

[87] Thereafter, Faeez Amirul (DW2) withdrew RM650,000 from his company's account and handed it to Dato' Mohd Salleh, Sallehudin Satar and Abd Rahman who in turn handed it over to the plaintiffs and their father at a room in Concorde Hotel Johor Bahru.

[88] Whereas Faeez Amirul (DW2) agreed in his testimony that there is no proof of the sums RM100,000 and RM650,000 handed to the plaintiffs and or their father.

[89] The plaintiffs and their father vehemently deny receiving the sums RM100,000 and RM650,000.

[90] It is not in dispute that the defendant is unable to produce any written acknowledgement or documents to prove that the sums RM100,000 and RM650,000 were paid to plaintiffs and or their father.

[91] This fact was also conceded by learned counsel for the defendant during oral submissions.

[92] According to Faeez Amirul (DW2) during his testimony, the brown LV bag placed on the round table shown in the photographs marked as D9 and D10 contains the deposit cash sum of RM100,000.

[93] However, no evidence was led to show that the brown LV bag did indeed contain cash in the sum of RM100,000 and this sum was handed to the plaintiff's father who can be seen in the photograph together with Dato' Salleh and Sallehuddin Satar.

[94] As for the balance sum of RM650,000, Faeez Amirul (DW2) testified that he handed this sum to Dato' Mohd Salleh bin Mohamad, Sallehudin Bin Satar, Abd Rahman who in turn handed it over to the plaintiffs and or their father at a room in Concorde Hotel Johor Bahru.

[95] Once again, no evidence was produced that the sum of RM650,000 was withdrawn from Faeez Amirul's (DW2) company, Al Afaq Event Management's account and handed to the plaintiffs and or their father.

[96] Neither Dato' Salleh, Sallehudin Satar nor Abd Rahman who are important parties in the sale transaction were called to testify in respect of this fact.

[97] Learned counsel for the defendant submits that the burden is on the plaintiffs to call Dato' Salleh and Sallehuddin Satar.

[98] In my judgment, since the plaintiffs have denied receiving any purchase consideration for the sale of the land apart from the RM10,000 online payment, the burden is on the defendant to call Dato' Salleh and

Sallehuddin Satar since the defendant is alleging that the payment of RM100,000 and RM650,000 was made through Dato' Salleh in the presence of Sallehuddin Satar.

[99] In the circumstance, an adverse inference under s. 114(g) of the Evidence Act 1950 ought to be drawn against the defendant for failing to call Dato' Salleh and Sallehuddin Satar to testify with regards to the payment of RM100,000 and RM650,000 to the plaintiffs and or their father.

[100] The inference which needs to be drawn is that if they were called, both of them would not be able to confirm or produce any evidence of the purported payments to the plaintiffs and or their father.

[101] Whereas the solicitor (DW3) in his police report lodged to confirm that the plaintiffs executed the impugned power of attorney witnessed by him also stated that the sum RM650,000 was paid in cash to the plaintiffs at Concorde Hotel KL and the sum RM100,000 was paid to the plaintiffs at the lobby of KSL Hotel, Johor Bahru by Dato' Salleh, Sallehudin Satar and Abdul Rahman.

[102] However, during cross-examination, the solicitor (DW3) contradicted himself with his report by testifying that he had no knowledge or proof that these sums were paid by the defendant to the plaintiffs.

[103] The court notes that the defendant himself did not lodge any report stating that these payments were made to the plaintiffs.

[104] In conclusion, there is no iota of evidence that these sums were indeed paid by defendant except for the sum RM10,000 transferred by Dato' Salleh to plaintiffs father on the date of the execution of the power of attorney.

[105] In my judgment, defendant has failed to prove on the balance of probabilities that he has paid the sum RM750,000 (RM375,000 x 2) to the plaintiffs and or their father towards the purchase of the lands.

[106] This is further fortified by the fact that if it is true that defendant did indeed pay the purchase consideration for the sum RM750,000, surely he would have counterclaimed against the plaintiffs for reliefs in respect of the monies paid by him. But, the court notes that the defendant does not have any counterclaim against the plaintiffs.

[107] Next, there was no sale and purchase agreement executed by the parties and this was confirmed by the solicitor (DW3).

[108] The solicitor (DW3) also testified that he does not know the purchase price for the lands. According to him, his role was merely to prepare an irrevocable power of attorney to protect the defendant's interest since the defendant had expended monies to purchase the lands.

[109] In my judgment, the solicitor (DW3) as an Advocate and Solicitor has a duty to ensure that the purchase considerations for the lands were fully paid by the defendant to the plaintiffs and obtain a written confirmation from the plaintiffs that they had received the monies before proceeding to adjudicate the memorandum transfer and presenting it to the land office. He ought not to have relied only on the defendant or whoever instructed him on behalf of the defendant in respect of payment of the purchase considerations to the plaintiffs.

[110] However, when questioned by the court, the solicitor (DW3) confirmed that he did not do so. I find the solicitor had failed to discharge his duties carefully and diligently. His conduct as an Advocate and Solicitor in attending to the conveyance of the lands between the plaintiffs and the defendant certainly falls short of good conveyancing practice.

[111] What the defendant did was use the power of attorney executed by the plaintiffs to transfer the said lands onto himself by signing as transferor and transferee.

[112] The power of attorney makes no mention of any valuable consideration given by the defendant to the plaintiffs if indeed the purpose of the power of attorney was to serve as a sale and purchase agreement between the parties.

[113] The impugned power of attorney has no life of its own. It does not confer any proprietary right to the defendant. In *Ngadi Apandi v. Mohamad Ali Md Ahsan & Ors* [2016] CLJU 1743; [2016] 1 LNS 1743 His Lordship Wan Ahmad Farid Wan Salleh JC (as he then was) held:

> [18] As I said in my judgment in *Mariaton Darussalam & Anor v. Abdul Rahim Omar & Ors* [2016] 5 CLJ 611 "an irrevocable power of attorney, even if for valuable consideration within the meaning of s. 6 of the Powers of Attorney Act 1949, cannot be construed as a sale and purchase agreement with the necessary essence and ingredients of a valid contract". This is more so when there is no indication at all that the POA in the instant?
>
> case, at least on the face of it, is not a power of attorney for valuable consideration within the meaning of s. 6.
>
> [19] A power of attorney, no matter how the words therein are couched, does not have a life of its own. It does not confer any proprietary right to the donee. In *Firstcrest Global Limited & Ors v. Indexia Assets Limited & Ors* [2006] 1 LNS 65; [2006] 5 MLJ 723 CA, James Foong JCA (as he then was) in delivering the judgment if the Court of Appeal stated the law as follows:
>
> > Refusing to concede, Mr Malik Imtiaz argued that aside from the Sale of Shares agreement, there is also the power of attorney. This instrument gives certain powers to the appellants in respect of the

A disputed block of shares. But it is my view that this instrument (power of attorney) is only a subsidiary document to the Sale of Shares agreement. Without the Sale of Shares agreement, which is the pn' ncipal instrument, the power of attorney cannot subsist. It does not have a life of its own. It is appendant to the Sale of Shares agreement. So when the principal agreement cannot give
B proprietary right in law then the power of attorney, a subsidiary instrument, also confers no such right.

[114] In the circumstance, I find the impugned power of attorney is only a subsidiary instrument and not a sale and purchase agreement for the lands that contains all the terms and conditions for the sale.

C

[115] The defendant had no right to use the impugned power of attorney which had no valuable consideration and which is not a sale and purchase agreement to transfer the lands. In *Tan Ah Kow & Anor v. Tan Chaui En* [2018] 2 CLJ 610, the Court of Appeal held as follows:

D (3) The POA did not make any specific reference to the 13 lands, which were described as 'properties' in the recital of the POA. Furthermore, there was no mention in the POA of any valuable consideration being given by the respondent to the first appellant if indeed the purpose of the POA was to serve as a SPA between the parties. Although the POA came under the ambit of the Powers of Attorney Act 1949, it was the Contracts
E Act 1950 which applied in view of the respondent's contention that the POA could be treated as the alleged SPA reduced in writing. Therefore, the POA could not stand as it had vague terms and discrepancy of definitions. It was void for uncertainty, as provided under s. 30 of the Contracts Act 1950. The respondent had no right to use the POA, which was not an SPA, to transfer the first appellant's 1/3 share in the ten lands
F to himself.

[116] For the foregoing reasons, I find the impugned irrevocable power of attorney in both cases null and void.

[117] Hence the memorandum of transfers (Form 14A) executed by the
G defendant as transferor and transferee using the impugned irrevocable power of attorney in both cases is null and void.

[118] In light of my above finding, in my judgment the transfer of plaintiff Mustaqeem's land to defendant is defeasible under s. 340(2)(b) of the NLC (Revised 2020) on the ground it was registered using the power of attorney
H and Memorandum of Transfer which are void instruments.

[119] Section 340 of the NLC (Revised 2020) read:

340 Registration to confer indefeasible title or interest, except in certain circumstances

I (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[120] Further, in support of my finding, I rely upon the decision of the Court of Appeal in *Five Star Heritage Sdn Bhd & Ors v. Nai Ninn Sararaksh & Anor* [2023] 5 CLJ 345, wherein it was held:

whether the doctrine of indefeasibility of title would prevent the setting aside of the registration of the land now in the name of Five Star

[87] Any transfer of land held under a public charitable trust without a proper and valid court order would be void as caught under the prohibition of a transfer under a void or insufficient instrument. The instrument of transfer in Form 14A under the National Land Code premised as it is on a court order that has been set aside would be void and the transfer that it purported to effect would have to be set aside.

[121] Before the above decision, the Federal Court in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1 held as follows:

[66] Under s. 340(2)(b), the title or interest of any person for the time being registered as proprietor of any alienated land shall not be indefeasible where the registration was obtained using an insufficient or void instrument.

[67] In "*Tenure and Land Dealings in the Malay States*'" by David SY Wong, at p. 364 the author explained the phrase "insufficient or void instrument" for the purpose of s. 340(2)(b) of the NLC as follows:

A (iv) "Insufficient or void instrument" Section 340(2)(b) also provides that a registered title is defeasible where registration was obtained "by means of an insufficient or void instrument". Unlike "forgery", the expression "insufficient or void instrument" is so wide as to defy comprehensive enumeration of the circumstances in which a purportedly executed instrument of dealing may be
B regarded by the court as "insufficient" or "void". Some general observations may indicate how wide its domain may be. The reference to the insufficiency and voidness of an instrument could pertain to all sorts of circumstances and matters relating to the execution of the instrument. Where the instrument is executed in pursuance of a contract of dealing, the invalidity of contract (*ie*,
C where the contract is void) would plainly entail that the instrument is void accordingly. The instrument may also he "insufficient" or "void" for reasons relating to the capacity of the parties concerned, or by reason of some formal defect or irregularity. In addition, non-compliance with relevant statutory requirements may also
D result in the instrument being regarded as "insufficient" or "void"."

[122] Based on the foregoing, the plaintiffs have proven their claim on the balance of probabilities.

Decision

E

[123] In conclusion, the plaintiffs' claims in both suits are hereby allowed with cost.

[124] In the plaintiff's (Mustaqeem's) claim in suit No. 27, I hereby declare the impugned power of attorney and the memorandum of transfer is null and
F void, the registration of these instruments with the land office to be revoked and cancelled, the defendants' name on the title to be cancelled and the plaintiff (Musteqeem's) name to be reinstated as the proprietor of the land.

[125] Whereas in plaintiff's (Naqiuddin's) claim in suit No. 28, I hereby declare the impugned power of attorney is null and void and its registration
G with the land office to be revoked.

[126] I also grant a consequential order for the Land Administrator to give effect to my above orders under s. 417 of the National Land Code (Revised 2020).

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